

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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621
Court of Appeals of the District of Columbia.

JANUARY TERM, 1920.

No. 3344.

GERTRUDE K. HOCKMAN, APPELLANT,

vs.

RICHARD S. SHREVE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED DECEMBER 18, 1919.

PRINTED JANUARY 26, 1920.

Court of Appeals of the District of Columbia.

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Court of Appeals of the District of Columbia.

No. 3344.

GERTRUDE K. HOCKMAN, Appellant,

vs.

RICHARD S. SHREVE.

a Supreme Court of the District of Columbia.

At Law. No. 62947.

RICHARD S. SHREVE, Plaintiff,

vs.

GERTRUDE K. HOCKMAN, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause towit:

1 *Complaint and Summons in the Municipal Court.*

Filed October 15, 1919.

In the Supreme Court of the District of Columbia.

At Law. No. 62947.

RICHARD S. SHREVE, Plaintiff,

vs.

GERTRUDE K. HOCKMAN, Defendant.

DISTRICT OF COLUMBIA, *To wit:*

Your Complainant Richard S. Shreve being first duly sworn according to law, states that he is entitled to the possession of the premises No. 1828 Ingleside Terrace, Washington, D. C. located in

the District of Columbia, and that the same is unlawfully detained from him and held without right by the defendant to whom J. Leo Kolb had heretofore rented the said premises as a monthly tenant and whose tenancy and estate has been determined by the service of a due notice to quit. Said premises are, and at the time of said rental were owned by complainant, who is in the employ of and officially connected with a branch of the United States Government, and are necessarily required by him for occupation by himself, his wife and children. The said rental agreement has been duly assigned in writing to complainant. Complainant therefore prays that a Summons be issued, commanding the defendant to appear and show cause why judgment should not be given against her for the restitution of the possession of said premises, and costs of this suit.

RICHARD S. SHREVE.

2 Subscribed and sworn to before me this 19th day of September A. D. 1919.

[SEAL.]

NINA I. THOMAS,
Notary Public, D. C.

Summons.

* * * * *

The President of the United States to the Defendant, Gertrude K. Hockman, Greeting:

You are hereby summoned to appear in this Court on the 3rd day of Oct. A. D. 1919, at 10 o'clock A. M., to answer the plaintiff's complaint and show cause why judgment should not be given against you for the restitution of the possession of the premises described in the complaint under oath filed herein by said plaintiff and costs of this suit and in case of your failure so to appear and answer, the suit will be proceeded with as in case of default.

Witness the Honorable Judges of said Court this 22 day of September A. D. 1919.

\$1.00 Pd.

BLANCHE NEFF, [SEAL.]
Clerk.

By R. H. COLLINS,
Assistant Clerk.

Marshal's Return.

Sept. 22, 1919.

Summoned as within directed.

MAURICE SPLAIN,
U. S. Marshal,
By E. A. McLAUGHLIN,
Deputy Marshal.

3

(Endorsed.)

Oct. 3, 1919.

Judgment for plaintiff for possession of the within described premises after trial with costs.

EDW. B. KIMBALL,
Judge.

Appeal noted.

Certificate of Municipal Court on Appeal.

* * * * *

Date
1919.

Proceedings.

Plaintiff's attorney—

Defendant's " —G. E. Edelin.

Sept. 22nd. Sworn complaint filed. Summons and copy issued returnable Oct. 3—10 A. M.

" " Summons returned "summoned as within directed."

Oct. 3rd. Trial—witnesses sworn.

" " Judgment for plaintiff for possession of the within described premises and costs. Appeal noted.

" 6th. Appeal, undertaking on, with U. S. Fidelity & Guaranty Co., surety, approved and filed.

" 14th. Appeal, record on and papers filed with Clerk of Supreme Court, D. C. and notice sent to defendant's attorney.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness, the Honorable Judges of said Court this 14th day of October A. D. 1919.

BLANCHE NEFF,
Clerk.

Costs paid by Plaintiff, \$2.85.

Costs paid by Defendant, \$1.00.

Plaintiff's Affidavit.

Filed October 17th, 1919.

* * * * *

DISTRICT OF COLUMBIA, ss:

I, Richard S. Shreve, being first duly sworn according to law, make oath and say: I am the plaintiff above named and have a just

right to recover possession of premises known as No. 1828 Ingleside Terrace, in the District of Columbia, which are now wrongfully detained from me by the defendant Gertrude S. Hockman. My wife and I are and for a number of years last past have been the owner in fee of said premises, a dwelling house. Under date of February 23rd 1918, the said premises were rented to the defendant by J. Leo Kolb, a real estate broker, who in renting the same acted as agent for me. The agreement under which the said defendant has been occupying said premises since said date was duly executed by her and is in the following words and figures:

"This agreement, made this 23rd day of February, A. D. 1918 between J. Leo Kolb, party of the first part, and Mrs. Gertrude K. Hockman, party of the second part, all of the City of Washington, District of Columbia.

5 Witnesseth, That the party of the first part does hereby let unto the party of the second part as monthly tenant only the premises situated 1828 Ingleside Terrace, Washington, D. C., said tenancy to commence on the 17th day of March, A. D. 1918, at and for the monthly rent of Thirty-two and 50/100 Dollars. The party of the second part hereby covenants and agrees to take and hold the said premises as monthly tenant and to pay therefor to the party of the first part, at his office, the monthly rent of (\$32.50) Thirty-two and 50/100 Dollars, in advance, the first payment to be made on the 17th day of March and the subsequent monthly payments to be made in advance on the 17th day of each and every month during the continuance of said tenancy. And the party of the second part further covenants and agrees that she will not use said premises for any unlawful purpose, but will occupy same only as a Private dwelling and will not sublet said premises, or any part of same, nor transfer possession thereof to any person or persons nor carry on any business therein except as aforesaid without first obtaining the written consent thereof of the party of the first part.

And the party of the second part further covenants and agrees to pay all bills for water, gas and electric light used on or about the said premises.

It is understood and agreed between the parties hereto that if the said party of the second part shall fail to pay the rent in advance, as aforesaid, whether demand shall have been made for same or not, or shall neglect to pay the water rent, gas and electric light bills at the time and on the day when the same shall fall due and be payable, or if she shall in any other respect violate any of the conditions and covenants contained in this agreement, then it shall be lawful for the party of the first part, or his assigns, without any previous demand for possession or notice to the party of the second part to quit the said premises (the 30 days' notice to quit being hereby expressly waived) to recover possession of the said premises under and by virtue of a seven days' summons in accordance with the provisions of the Code of Law for the District of Columbia, relating to proceedings between landlords and tenants, or by such other legal process as may at the time be in operation in said District of Columbia.

And should the party of the first part, during the continuance of this agreement, desire to have again and repossess the said premises, and there should at the time have been no default in the payment of rent or violation of any other of the covenants herein, by the party of the second part, then the party of the first part, or his assigns, covenants and agrees to give the party of the second part 30 days' notice in writing, which notice shall be given on the first day of a month's tenancy, and at the end of that time the party of the second part covenants and agrees to remove from and quit the premises and the party of the second part hereby covenants and agrees to give the party of the first part, or his assigns, at least 30 days' notice of any intention to remove from said premises, which notice shall likewise be given on the first day of a month's tenancy.

And it is further understood and agreed, That if under the provisions of this agreement a seven days' summons be served and a compromise or settlement shall thereafter be made, such act or acts shall not constitute a waiver of any covenant herein contained, and no waiver of any breach of any of said covenants shall be construed to be a waiver of the covenant itself, or of any subsequent breach thereof, or of this agreement. The party of the second part hereby further covenants and agrees to deliver up said premises in the like good order in which they now are, ordinary wear and tear and casualties by fire and storm only excepted; and that she will at all times acknowledge the title and defend the possession of the party of the first part and his assigns, and that he will not acquire, or seek to acquire title to said premises, nor acknowledge title in any other person or persons without first surrendering actual possession of the premises to the party of the first part or his assigns, except by the written consent of the party of the first part or his assigns, first had and obtained.

Witness out hands and seals the day and year first hereinabove written.

In the presence of—

J. LEO KOLB.

GERTRUDE K. HOCKMAN.

[SEAL.]

[SEAL.]”

Subsequently requiring possession of said premises, the said J. Leo Kolb duly assigned said lease to me, under date of August 1st, 1919, by endorsing on the back thereof the following words and figures;

“For value received I do this first day of August, 1919, hereby grant, assign, set over and transfer all my right, title and interest to the within agreement, and the premises herein described to Richard S. Shreve.

J. LEO KOLB. [SEAL.]”

Thereafter, under date of August 16th, 1919, I served notice to quit upon the defendant, in the following words and figures;

"Washington, D. C., August 16th, 1919.

Mrs. Gertrude K. Hockman,
1828 Ingleside Terrace, City.

DEAR MADAM:

You are hereby notified that Mr. J. Leo Kolb has duly assigned to me in writing the agreement between yourself and him dated the 23rd day of February, 1918, whereby you rented from him premises numbered 1828 Ingleside Terrace, Washington, in the District of Columbia, as a monthly tenant; that I am, and at the date of said agreement was, the owner of said property, and in the renting thereof Mr. Kolb was my agent; that I am in the employ of the United States Government and said premises are necessarily required by me for occupation by myself and family.

Therefore, as I am desirous of again having possession of said premises, I hereby give you notice to remove from and quit the same at the expiration of your month's tenancy which begins with August 17th, 1919.

RICHARD S. SHREVE."

and a few days later, in August, 1919, received from her the rental for said premises, in the sum of \$32.50, as reserved in said rental agreement, which paid rent until the 17th day of September, 1919.

The said notice was served by me in person. I called at said premises on said August 16th, where the defendant resided, and the door was opened by defendant's son. I asked for defendant, she came to the head of the steps, called down saying that she was ill, and could not come down stairs, but to send the paper I told her I had for her, by her said son, who was about seventeen years of age. I thereupon handed the original of said notice to her said son and the same was immediately delivered to her on said premises. The defendant testified in the Municipal Court of the District of Columbia in the trial of this cause, that the said paper was immediately after my delivery thereof to her said son, by him handed to her.

8 I necessarily require said premises for occupation by myself and my family. I am in the employ of the United States Government in the Zone Finance Office of the War Department in this City and have been employed by the Government for more than ten years last past.

In April, 1919, I was in possession of an apartment in this City and having the opportunity of occupying a house in Virginia near the City for the summer, sublet the said apartment with the understanding and agreement by the tenant to whom I sublet that it would be surrendered to me by him early this Fall. The apartment house changed hands and my sub-tenant made a rental agreement with the purchaser and without my consent, refused to honor or acknowledge his previous agreement with me or to surrender said premises to me. The house I now occupy located in Virginia, is a house fit for habitation in the summer only. It is not fit for occupation

in the winter months. It has no modern conveniences. It is raised above the ground on piers so that the wind blows under it. It was not built for a winter habitation and it would be unsafe and dangerous to health for me to attempt to reside there during the winter. Its walls are not sufficient to keep out the cold. It has no furnace in it, and cannot be kept warm in winter. I have two children who have heretofore been attending the public schools here in Washington, who should attend the schools this winter. I know of no other place I can get and therefore say that the said premises are necessarily required by me.

RICHARD S. SHREVE.

9 Subscribed and sworn to before me this 16th day of October, 1919.

[SEAL.]

NINA I. THOMAS,
Notary Public, D. C.

WHARTON E. LESTER,
Attorney for Plaintiff.

Affidavit of Defense.

Filed October 25, 1919.

* * * * *

DISTRICT OF COLUMBIA, ss:

Gertrude K. Hockman, being first duly sworn, deposes and says, that she is the defendant in the above entitled cause; that she has a just and meritorious defense to the said cause of action, which defense is as follows: affiant denies that she wrongfully detains from plaintiff premises known as 1828 Ingleside Terrace, in the District of Columbia and denies that plaintiff has a just right to recover possession of the same, but on the contrary she entered lawfully and peacefully into possession of the said premises under an agreement of lease between herself and J. Leo Kolb on the 23rd. day of February, 1918 and that under and by virtue of the Saulsbury Resolution the said agreement of lease has continued and therefore she has remained in lawful and peaceful possession of the premises by virtue of the said continuance; she admits that for a number of years the said premises have been owned by the plaintiff, together with his wife; she denies the allegations in plaintiff's affidavit referring to the service on her of a notice to quit the

10 premises, but on the contrary avers that neither the plaintiff, his agent, nor any one acting for him, at any time, served any notice whatever, to quit the premises; that as a matter of fact on the evening of the 16th. day of August 1919, feeling indisposed she was reclining on a couch which was situated on the back porch of the second floor of the said premises, the said back porch being cut off from the rest of the house by a door which was then closed; that while so reclining on the couch on the said porch, she was approached by her son who informed her that the plaintiff, Richard

S. Shreve, desired to see her; that thinking the plaintiff desired to see her for the purpose of obtaining an answer to a letter received by her from him on the morning of the same day she instructed her son to advise the plaintiff she would answer his letter the next day, and she is informed and believes and therefore avers that her said son delivered that message to the plaintiff; that she is informed and believes and therefore avers that the plaintiff thereupon handed to her son a notice to quit the premises and immediately left; that her said son brought and handed to her the said notice to quit but on account of her said indisposition and further on account of the darkness on the said porch she did not read the notice for several days, when to her surprise, she found it to be a notice to quit the premises; that at no time during the visit to the premises by the plaintiff did she leave the couch on the back porch and that further she had no conversation with the plaintiff whatsoever; that although the premises are owned by the plaintiff and his wife, the alleged notice to quit is signed by the plaintiff alone; that she denies the plaintiff desires possession of the said premises for his own use but on the contrary she has been informed and believes, and therefore avers that the said premises are for sale by the plaintiff; that the said premises are listed for sale in the real estate office of Cook and Marshall, 921 Fifteenth Street, Northwest, Washington, D. C.; that since the institution of this suit several persons at divers times have visited the said premises claiming to be prospective purchasers of the same; affiant further denies that the plaintiff has been in the Government Employ for the past ten years, but on the contrary has until very recently been employed by the Board of Education of the District of Columbia.

GERTRUDE K. HOCKMAN.

Sworn to and subscribed before me this 25th. day of October, 1919.

[SEAL.]

PHILIP HERMAN,
Notary Public, D. C.

Motion for Judgment.

Filed October 27, 1919.

* * * * *

Comes now the plaintiff, by his attorney, and moves the Court for judgment for possession in the above entitled case because of the insufficiency of defendant's affidavit.

WHARTON E. LESTER,
Attorney for Plaintiff.

12 George E. Edelin, Esq.,
Attorney for Defendant:

Please take notice that the above motion will be called to the attention of the Court for action thereon on Friday, October 31st at 10 o'clock, A. M., or as soon thereafter as counsel may be heard.

WHARTON E. LESTER,
Attorney for Plaintiff.

Copy of above received this 27th day of October, 1919.

GEORGE E. EDELIN,
Attorney for Defendant.

Supreme Court of the District of Columbia.

Friday, October 31, 1919.

Session resumed pursuant to adjournment, Mr. Justice Hitz presiding.

* * * * *

Come now the parties hereto by respective attorneys of record; whereupon plaintiff's motion for judgment for want of a sufficient affidavit of defense under Law Rule 19 of this Court is argued and submitted; upon consideration thereof it is ordered that said motion be and the same is hereby granted.

Wherefore, it is considered that the plaintiff herein do have and recover of the defendant herein possession of the premises
13 No. 1828 Ingleside Terrace, North West, located in the District of Columbia, and recover of said defendant and United States Fidelity and Guaranty Company, her surety, the costs of suit, to be taxed by the Clerk, and have execution thereof.

Further the plea of defendant filed herein to the jurisdiction of the Court is hereby overruled.

From the foregoing judgment the defendant by her Attorney in open Court notes an appeal to the Court of Appeals and the penalty of a bond on said appeal to operate as a supersedeas, is hereby fixed in the sum of Five hundred dollars (\$500.)

Memorandum.

October 31, 1919.—Supersedeas bond approved and filed.

Assignment of Errors.

Filed November 7, 1919.

* * * * *

Now comes the defendant and says that the Court erred as follows:

First. In rendering judgment against the defendant for possession under Rule 19, for the reason that the said rule is inconsistent with the statute governing landlord and tenant cases.

Second. In holding that the Court had jurisdiction over
14 the controversy.

Third. In holding that there was not such an issue of fact raised which should have been submitted to a jury.

Fourth. In holding that the plaintiff's affidavit of merit set forth such a complete cause of action as to justify judgment.

Fifth. In holding that the affidavit of defense did not set forth a sufficient defense to defeat plaintiff's cause of action.

Sixth. For other errors apparent on the face of the record.

GEORGE E. EDELIN,
Attorney for Defendant.

Designation of Record.

Filed November 7, 1919.

* * * * *

The Clerk of the Court will certify the following pleadings and papers in the above entitled cause to the Court of Appeals of the District of Columbia.

1. Complaint and Summons of the Municipal Court.
2. Certificate of the Municipal Court on appeal.
3. Affidavit of plaintiff under Rule 19.
4. Affidavit of defense.
5. Motion for judgment under Rule 19.
6. Order of Court entered October 31, 1919.
7. Memorandum showing bond approved, and filed October 31, 1919.

15 8. Assignment of errors.

GEORGE E. EDELIN,
Attorney for Defendant.

16

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 62947 at Law, wherein Richard S. Shreve is Plaintiff and Gertrude K. Hockman is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of December, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,

Clerk,

By W. E. WILLIAMS,

Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3344. Gertrude K. Hockman, appellant, vs. Richard S. Shreve. Court of Appeals, District of Columbia. Filed Dec. 18, 1919. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

JANUARY TERM, 1920.

No. 3344.

GERTRUDE K. HOCKMAN, APPELLANT,

vs.

RICHARD S. SHREVE, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

JULIUS I. PEYSER,
GEORGE E. EDELIN,
Attorneys for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

JANUARY TERM, 1920.

No. 3344.

GERTRUDE K. HOCKMAN, APPELLANT,

vs.

RICHARD S. SHREVE, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

On the 23rd day of February, 1918, defendant-appellant entered into possession of premises No. 1828 Ingleside Terrace Northwest, in the City of Washington, as a monthly tenant, under and by virtue of an agreement of lease entered into by and between herself and one J. Leo Kolb, a real-estate broker.

Under date of October 3, 1919, the plaintiff-appellee instituted suit for possession of the said premises, claiming that he was the owner of the same, that he was in the employ of the United States Government, and that the premises were necessarily required by himself, his wife, and his children. He further based his right of action on an alleged assignment of the beforementioned lease to himself.

After trial in the Municipal Court judgment was rendered in behalf of plaintiff-appellee. Whereupon an appeal was perfected to the Supreme Court of the District of Columbia. The case was heard on a motion for judgment filed by plaintiff under rule 19. Upon a hearing on the said motion and on affidavits of merit and defense, the motion for judgment was granted, from which this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

First. In rendering judgment against the defendant for possession under Rule 19, for the reason that the said rule is inconsistent with the statute governing landlord-and-tenant cases.

Second. In holding that the court had jurisdiction over the controversy.

Third. In holding that there was not such an issue of fact raised which should have been submitted to a jury.

Fourth. In holding that the plaintiff's affidavit of merit set forth such a complete cause of action as to justify judgment.

Fifth. In holding that the affidavit of defense did not set forth a sufficient defense to defeat plaintiff's cause of action.

Sixth. For other errors apparent on the face of the record.

ARGUMENT.

I.

It Was Error to Hold That the Supreme Court of the District of Columbia Had Jurisdiction Over the Controversy.

This cause was heard *de novo* in the Supreme Court on October 31, 1919. On October 22, 1919, the President of the United States approved the Act of Congress known as

"The Food Control and the District of Columbia Rents Act," Public No..63, 66th Congress, generally known as the "Ball Rent Bill." The attention of the court was called to this act, and to the fact that thereby jurisdiction over the present controversy had been conferred upon a Rent Commission to be appointed by the President. In section 109 of the said act, near the top of page 6, the following provision is made:

"* * * If there is a dispute between the owner and the tenant as to the accuracy or sufficiency of the statement set forth in such notice (notice to quit), as to the good faith of such demand, or as to the service of such notice, the matters in dispute shall be determined by the commission upon complaint as provided in section 106 of this title."

Both the good faith of plaintiff's demand and the service of the notice were attacked in the hearing in the Supreme Court and objection was made to the jurisdiction of the court (see record, pages 7, 8, and 9). By the express terms of the Ball Bill, the courts, in a case like the present one, are completely deprived of jurisdiction and the same is conferred upon the Rent Commission. It is true that at the time of the hearing below the President had not appointed the Rent Commission but at the same time the law was effective. There is nothing in the act, either by direct language or by implication, which would lead to the conclusion that it would not become effective until a time later than the day of approval. Therefore the law was as completely effective on the day it was approved (October 22, 1919) as it ever could be thereafter.

II.

Issues of Fact Were Raised Which Should Have Been Submitted to a Jury.

For the purposes of proceeding with a discussion of this contention only, it is assumed that the Supreme Court had jurisdiction over the controversy.

The affidavit of merit states:

"I necessarily require said premises for occupation by myself and family" (Rec., p. 6).

This is denied by defendant:

"that she denies the plaintiff desires possession of the said premises for his own use but on the contrary she has been informed and believes and therefore avers that the said premises are for sale by the plaintiff; that the said premises are listed for sale by the plaintiff in the real-estate office of Cook and Marshall, 921 Fifteenth Street Northwest, Washington, D. C.; that since the institution of this suit several persons at divers times have visited the said premises claiming to be prospective purchasers of the same" (Rec., p. 8).

This is more than a mere denial of the rights of the plaintiff to recover; it is a statement of facts, and raises an issue of fact, sufficient in law to entitle the defendant to a trial by jury.

If it is proved that the plaintiff did then, and now continues to hold the premises for sale, and that they are listed for sale in the offices of Washington real-estate brokers, and if other circumstances are presented which would further tend to prove the truth of the allegations of defendant, the plaintiff's right of action would be barred by virtue of section 109 of the Ball Rent Bill.

"Sec. 109, The right of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regu-

lation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the *bona fide* owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and *bona fide* occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the act entitled "An act to establish a code of laws for the District of Columbia," approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based; but in no case shall possession be demanded or obtained by such owner in contravention of the terms of any such lease or contract. If there is a dispute between the owner and the tenant as to the accuracy or sufficiency of the statement set forth in such notice, as to the good faith of such demand, or as to the service of notice, the matters in dispute shall be determined by the commission upon complaint as provided in section 106 of this title."

There is also a clear issue of fact raised in the affidavits filed by plaintiff and defendant, respectively, concerning the service of the notice to vacate. The allegations in defendant's affidavit are sufficient, if true, to defeat plaintiff's cause of action; therefore the issue raised is most material:

"* * * she denies the allegations in plaintiff's affidavit referring to the service on her of a notice to quit the premises, but on the contrary avers that neither the

plaintiff, his agent, nor any one acting for him, at any time, served any notice whatever, to quit the premises; that as a matter of fact on the evening of the 16th day of August, 1919, feeling indisposed, she was reclining on a couch which was situated on the back porch of the second floor of the said premises, the said back porch being cut off from the rest of the house by a door which was then closed; that while so reclining on the couch on the said porch, she was approached by her son who informed her that the plaintiff, Richard S. Shreve, desired to see her; that thinking the plaintiff desired to see her for the purpose of obtaining an answer to a letter received by her from him on the morning of the same day she instructed her son to advise the plaintiff she would answer his letter the next day, and she is informed and believes and therefore avers that her said son delivered that message to the plaintiff; that she is informed and believes and therefore avers that the plaintiff thereupon handed to her son a notice to quit the premises and immediately left; that her said son brought and handed to her the said notice to quit, but on account of her said indisposition and further on account of the darkness of the said porch she did not read the notice for several days, when to her surprise, she found it to be a notice to quit the premises; that at no time during the visit to the premises by the plaintiff did she leave the couch on the back porch and that further she had no conversation with the plaintiff whatsoever; that although the premises are owned by the plaintiff and his wife, the alleged notice to quit is signed by the plaintiff alone."

Section 1223 of the District Code provides:

"Sec. 1223. Service of Notice. Every notice to the tenant to quit shall be served upon him personally, if he can be found, and if he cannot be found it shall be sufficient service of said notice to deliver the same to some person of proper age upon the premises, and in the absence of such tenant or person to post the same in some conspicuous place upon the leased premises."

The notice was not served on defendant, personally, and it is apparent from defendant's affidavit that plaintiff made no attempt to find her or to make service upon her. Handing the notice to defendant's son did not make him plaintiff's agent; therefore, when the notice was handed to defendant it was not personal service by the plaintiff, or his agent, within the meaning of the code. The manner of following specific acts set forth by the statute must be strictly and technically obeyed, and plaintiff has no excuse for failing to serve defendant personally. She could have been found if plaintiff had made a reasonable and *bona fide* attempt to do so. Instead he was content to hand the notice to defendant's son, with no assurance whatever that it would be delivered to her.

"The complaint and notice were not served upon the defendant personally, but on the 2nd day of September, 1861, were served upon his wife, by delivering copies to her 'at the usual place of abode,' she being, according to the certificate of the sheriff, 'a white woman over 14 years of age.' No statement is made by the officer that the defendant could not be found, nor is any reason given why personal service was not made upon him.

* * * * *

"Service upon the wife of the defendant was not service upon him. No theoretical unity of husband and wife can make service upon one equivalent to service upon the other.

* * * * *

"The substituted service in actions purely *in personam* was a departure from the rule of common law, and the authority for it, if it could be allowed at all, must have been strictly followed.

* * * * *

"The statute in providing how service shall be made evidently implies that when a summons is placed in

the hands of an officer for service, that he will use ordinary diligence, at least to find the party against whom the summons is issued, in order that he may make personal service upon him; but after using ordinary diligence, if he should fail to find such party, constructive service may be made."

Settlemier *vs.* Sullivan, 97 U. S., 1110.

"A statute providing a method for service of process for the purpose of bringing an individual or a corporation into court, *must be strictly followed*, and the court is powerless to declare service of process valid where there has not been a strict compliance with requirements of the statute."

Continental Jewell Filtration Co. *vs.* Karr, 31 App. D. C., 459.

There was not such a compliance with the District Code, in view of the above cases, to give plaintiff, in the instant case, the right to base a cause of action on the alleged notice.

It is respectfully submitted, therefore, that the court has one of two courses: to either reverse the judgment of the Supreme Court for the want of jurisdiction over the present controversy, or to reverse the judgment of the lower court and remand the cause for a trial by jury upon the issues of fact raised.

Respectfully,

JULIUS I. PEYSER,
GEORGE E. EDELIN,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR 3 - 1920

Henry W. Hodges.
Clerk

Court of Appeals, District of Columbia.

JANUARY TERM, 1920.

No. 3344.

GERTRUDE K. HOCKMAN, APPELLANT,

vs.

RICHARD S. SHREVE.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

WHARTON E. LESTER,

Attorney for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

JANUARY TERM, 1920.

No. 3344

GERTRUDE K. HOCKMAN, APPELLANT,

vs.

RICHARD S. SHREVE.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

Appellee, hereinafter called plaintiff, recovered judgment for possession of premises No. 1828 Ingleside Terrace, in this District, after trial in the municipal court. Appellant, hereinafter called defendant, appealed from that judgment to the Supreme Court of this District, where judgment for possession was given under law rule No. 19, because of the insufficiency of the affidavit filed by defendant.

February 23, 1918, J. Leo Kolb, a real estate agent, rented these premises to the defendant by an agreement in writing (Rec., p. 4). He collected rent from the defendant until August 1, 1919, when he assigned the lease to the plaintiff (5). August 16th thereafter plaintiff served a notice to quit upon the defendant (6), and on September 22nd filed

suit in the municipal court, which resulted in a trial and judgment in his favor on October 3rd (3). The case was docketed in the Supreme Court of the District of Columbia on October 15th (1). October 17th plaintiff filed his affidavit under rule 19 of that court (3). October 22nd the so-called "Ball Rent Bill" was approved. October 25th defendant filed her affidavit of defense (7). October 27th motion for judgment was made, which resulted in judgment on October 31st (9).

Defendant has apparently deserted her first assignment of errors and advances but three propositions in defense of her position, namely:

1. That the Supreme Court of the District of Columbia was without jurisdiction of this cause because of the so-called "Ball Rent Bill."
2. That defendant's affidavit sets forth facts which require a trial by jury.
3. That the notice to quit by plaintiff was not properly served upon the defendant.

It appears a little simpler to discuss these propositions in in inverse order:

1. *Notice to Quit*.—Section 1223 of the code provides that if the defendant cannot be found, it shall be sufficient service to deliver the notice to some person of proper age upon the premises.

Plaintiff alleges that he went on the premises, asked for the defendant, who called to him from upstairs, saying she was ill and could not come down, but to send her the paper he told her he had, by her son, a boy about 17 years of age; that he handed the paper to this son, and that defendant testified in the municipal court that the notice was immediately thereafter delivered to her by her son.

Defendant alleges she was informed by her son that the

plaintiff desired to see her; that she sent plaintiff a message; thereafter he immediately left, and that her son brought and handed her the notice to quit (which had been given to this son for her by plaintiff), which notice she did not read for several days.

It is submitted that the service of the notice to quit was sufficient. It could not have been handed to the defendant, because, although on the premises, she would not be seen. In this brief, her counsel say, "She could have been found if the plaintiff had made a reasonable and *bona fide* attempt to do so." This can only mean that the defendant could have been found if the plaintiff had forced his way upstairs, where she says she was confined by indisposition and from whence she refused to come to see plaintiff.

The object of a notice to quit is merely that a defendant may know what to expect, and any manner of service will suffice if it appears that the notice reached the party within the time provided by the statute. That defendant did not see fit to read the notice, aside from the improbability of that being a fact, is her own affair. She says, upon her son receiving it, he "brought and handed to her the said notice to quit." Defendant made no motion to quash or to dismiss because of insufficient service of the notice.

It will be noticed that the "Ball Rent Bill" was not in effect at the time the Supreme Court of the District of Columbia acquired jurisdiction of this case. After jurisdiction was acquired the act was approved. Subsequently the defendant appeared, submitted to the jurisdiction of the court without making a motion to quash, and made objection to such jurisdiction only after motion for judgment was made.

In *Pulliam vs. Capital Traction Company*, 37 App., 301, comment was made upon the failure of defendant to make timely objection by a motion to quash or otherwise, he having entered his appearance by filing an affidavit of defense. This objection applies not only as to the question of jurisdiction, but to the sufficiency of the service of the notice to

quit. It is not contended that consent or waiver of objection can confer jurisdiction upon a court.

The authorities cited by defendant's counsel have no application to this case, for they relate only to the service of the process of a court, a jurisdictional matter.

2. *Sufficiency of Defendant's Affidavit.*—Plaintiff's affidavit is in conformity with the "Ball Rent Bill," which permits the owner of premises to recover his own property for his *bona fide* occupancy. Plaintiff sets forth (Rec., 6):

"I necessarily require said premises for occupation by myself and my family * * *. The house I now occupy located in Virginia, is a house fit for habitation in the summer only. It is not fit for occupation in the winter months. It has no modern conveniences. It is raised above the ground on piers so that the wind blows under it. It was not built for a winter habitation and it would be unsafe and dangerous to health for me to attempt to reside there during the winter. Its walls are not sufficient to keep out the cold. It has no furnace in it, and cannot be kept warm in winter. I have two children who have heretofore been attending public schools here in Washington, who should attend the schools this winter. I know of no other place I can get and therefore say that the said premises are necessarily required by me."

To meet these facts, stated under oath by plaintiff, with an absolute knowledge of the facts, defendant merely denies that plaintiff desires possession for his own use (a matter concerning which she can have no knowledge). She sets forth no facts. She avers she is informed and believes that the premises are for sale, are listed with brokers, and that since the institution of this suit "several persons" visited the premises claiming to be prospective purchasers thereof. She does not set forth the source of her information. She does not say that she expects to prove such facts at the trial or that she offered to prove such facts at the trial in the municipal court, doubtless because she has no such expectation

and made no such offer, and to say so under oath might be a serious matter. She does not pretend that the "several persons" who visited the premises were sent by plaintiff or his agents, or that he or they knew of such visits. She expects the court to infer as much. She does not even say that she herself did not cause these "several persons" to visit the premises for the very purpose of enabling her to use the language she has used in her affidavit. She does not give the names of these persons or any information which will justify the court in believing that the statements made upon oath by the plaintiff, which are necessarily known to him, are untrue.

It has repeatedly been held that matters alleged upon information and belief need the support, under oath, of the affiant that she expects to prove them at the trial.

• "*Ball Rent Bill.*"—Defendant's counsel claim that the Supreme Court of the District of Columbia was without jurisdiction over this case. That is saying that the so-called "*Ball Rent Bill*," by indirection, deprived said court of jurisdiction, which it concededly had, and which had attached prior to the passage of the act.

When this suit was instituted the said act was not in effect, but it had been discussed, and plaintiff's affidavit was made in conformity with its expected requirements. It is submitted that it is sufficient. The act provides that:

"The rights of the tenant under this title shall be subject to the limitation that the *bona fide* owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and *bona fide* occupancy by himself, or his wife, children, or dependents." * * *

Plaintiff's affidavit was drawn to meet these limitations, all of which would have been unnecessary but for the provisions of the act. It is not believed necessary to cite authorities to show that a court does not lose jurisdiction by a statute of this character.

It is submitted that plaintiff's affidavit is in conformity with the so-called "Ball Rent Bill." It is further submitted that that act did not deprive the Supreme Court of the District of Columbia of jurisdiction of this cause, which had attached prior to its approval. If these contentions are not sound, it is submitted that the "Ball Rent Bill" is unconstitutional and void. It authorizes the taking of property without due process of law and it impairs the obligation of a contract.

Believing that it is not necessary for the court to decide the question of the constitutionality of the "Ball Rent Bill" in this case, because plaintiff's affidavit is sufficient, and because the Supreme Court has jurisdiction and has rendered a proper judgment, further discussion of the constitutionality of said act is not now attempted. If wrong in these assumptions, the plaintiff presents for consideration the question whether or not the act is constitutional and prays leave of the court to file an additional brief on that point, if the court desires further help from his attorney, instead of writing one now, when he does not believe the court will find it necessary to pass upon the question.

Respectfully submitted,

WHARTON E. LESTER,
Attorney for Appellee.

